

0216029C

R. IV ?

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

APR - 8 2003

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b),) MB Docket No. 02-335
Table of Allotments,) RM-10545
FM Broadcast Stations)
(Hart, Pentwater and)
Coopersville, Michigan))

TO: Assistant Chief, Audio Division
Media Bureau

OPPOSITION

WATZ Radio, Inc. ("WATZ"), licensee of FM Broadcast Station WATZ-FM, Channel 257C2 (99.3 MHz), Alpena, Michigan, respectfully submits its Opposition to the "Supplement" and the "Motion to Accept Supplement" filed by Fort Bend Broadcasting Company ("Fort Bend") on or about March 31, 2003. In support whereof, the following is shown:

1. Fort Bend's "Supplement" is at once ironic and humorous. Fort Bend's very participation in this case is a clear subterfuge of the "notice and comment" requirements of the Administrative Procedure Act. Rather than file a "Petition for Rulemaking" to seek the reallocation of Channel 257 from Frankfort to Traverse City—the city that Fort Bend wants WBNZ(FM) to serve, the largest city in the region and the city of license of WLDR(FM), owned by Fort Bend's principal—Fort Bend has tried not once, but twice, to

044

circumvent the normal channel allocation procedures—that is to say, to abridge the rights of others to file counterproposals—by filing convoluted and shady “counterproposals” designed to foreclose the “notice and comment” rights of other parties, including WATZ.

2. Now, when the Commission has clarified its rulemaking procedures in *Pacific Broadcasting of Missouri LLC*, 2003 WL 274234, FCC 03-18 (2003) to end the type of practice employed by Fort Bend, it squeals like a stuck pig.

3. Unfortunately for Fort Bend, its claim that the application of *Pacific* in the above-entitled matter violates the Administrative Procedure Act is unavailing, because Fort Bend never filed a proper counterproposal to begin with.

4. To reiterate the argument WATZ made in its January 15, 2003 “Comments” in this case, the use of Channel 257 at Frankfort, at whatever class and power level, is not mutually-exclusive with the use of either Channel 287 at Hart or Coopersville or Channel 231 at either Pentwater or Hart, at whatever class and power level. How Fort Bend attempts to link Channel 251 in northwestern lower Michigan to the use of Channel 287 at Hart and Coopersville is to propose the use of Channel 287A at Glen Arbor to replace Channel 223A, which Fort Bend proposes to move from Glen Arbor to Frankfort.

5. Channel 287A is not available for assignment at Glen Arbor were WCXT(FM) to remain licensed to Hart. According to the commission's database, WCXT's licensed Class C2 facility (BLH-20011019AAD) is located at N. Lat. 43° 40' 34", W. Long. 86° 14' 20". The Glen Arbor community coordinates assumed by Fort Bend, N. Lat. 44° 53' 50", W. Long. 85° 59' 06", are 137.191 kilometers (85.247 miles) north of WCXT(FM)'s transmitter site; Section 73.207 of the Rules calls for a spacing between co-channel A and C2 facilities of 166 kilometers (103 miles)—rendering a proposed use of Channel 287A at Glen Arbor some 28.809 kilometers (17.9 miles) short. Therefore, Channel 287A would not be available for assignment at Glen Arbor unless and until WCXT(FM)'s rulemaking proposal for Coopersville were granted, a construction permit were granted and its covering license for the newly constructed Coopersville facility were granted.

6. Therefore, it is readily seen that the Fort Bend "counterproposal" is contingent upon, and not in conflict with, the granting of the Hart/Coopersville/Pentwater petition. The Commission held in *FM Table of Allotments, Milton, West Virginia and Flemingsburg, Kentucky*, 11 FCC Rcd 6374 (1996), that, to have a valid "counterproposal", the channel proposed must be "in conflict", not "contingent upon". See also *FM Table of Allotments, Indian Springs*,

Nevada et al, 14 FCC Rcd 10568 (1999); **FM Table of Allotments, Angel Fire, New Mexico et al**, 15 FCC Rcd 11657, n. 4 (2000); **Television Table of Allotments, Wilmington, North Carolina**, 6 FCC Rcd 6969, 6971 (1991).

7. Therefore, since the linchpin for the whole Fort Bend proposal, the allocation of Channel 287 at Glen Arbor, cannot possibly be made under any circumstances until the relocation of WCXT(FM), Hart to a new transmitter site in proximity to Coopersville, the proposed reallocation of Channel 257 to Garfield Township, Michigan—the real aim of Fort Bend's submission—is not a valid "counterproposal".

8. Since Fort Bend's proposal in this proceeding is not a valid counterproposal, we never reach the "backfill channel" issue dealt with by *Pacific*, since the proposed "backfill" channel cannot be removed from Glen Arbor and moved to Frankfort to begin with, because under long-standing Commission policy, WCXT(FM)'s licensed facilities at Hart are still entitled to protection until it is granted a new covering license for its Coopersville facility. See, e.g., *Letter to Thomas J. Hutton, Esq. et al (KSTP(AM) et al)*, 16 FCC Rcd 11979, n. 7 (1991)¹. Thus, Channel 287A is

¹The text of footnote 7 states:

Note that, pursuant to long-standing Commission procedure, any application filed prior to the grant of licenses to cover the modifications granted to KSTP. WLQV and WTOP must provide protection to the currently licensed facilities of each station as well as to the modified facilities authorized herein. Any application filed prior to the grant of such

not presently available for allocation to Glen Arbor in lieu of Channel 223A, because Channel 287A at Glen Arbor would be irreconcilably short-spaced to existing co-channel WCXT(FM), and as a result, Channel 223A is not available for relocation from Glen Arbor to Frankfort.

9. The dismissal of Fort Bend's "Counterproposal" does not irreparably injure Fort Bend, in the sense that Fort Bend is certainly free to refile its proposal as a proper "Petition for Rulemaking" on its own merits. The public interest, convenience and necessity would be well served by the Commission's dismissal of said "Counterproposal", which will permit the immediate consideration of the Waters Broadcasting Corporation rulemaking proposal, a proposal which is not in conflict with the potential reallocation of WBNZ(FM), Channel 257, from Frankfort to the Traverse City area.

Conclusion

10. Fort Bend's claims that the Commission's ruling in ***Pacific Broadcasting of Missouri LLC*** violates Fort Bend's rights under the Administrative Procedure Act is a red herring, because Fort Bend never filed a proper "Counterproposal" in the above-captioned proceeding. Thus,

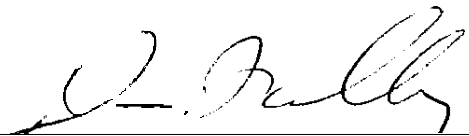
license which fails to provide the required protection to any or all of these stations, (or to any other station), will be returned as unacceptable for filing. *See* Memorandum Opinion and Order, In Re Application of Southern Oregon University for a New AM Radio Station, Mountain Gate, California, File No. BP-971212AB, FCC 99-31, adopted October 25, 1999; released October 28, 1999.

its "Supplement" is unavailing, and its Counterproposal remains defective, whether or not Commission policy allows for the allocation of "backfill channels" in channel reallocation proceedings. The public interest and the fair administration of justice in Commission proceedings requires the prompt dismissal of the Fort Bend "Counterproposal".

WHEREFORE, WATZ Radio, Inc. urges that (1) the December 30, 2002 "Counterproposal" advanced by Fort Bend Broadcasting Company **BE DISMISSED OR DENIED** as an improper "Counterproposal" in violation of Section 1.420(d) of the Rules and the case law decided pursuant to that subsection, and (2) that the Petition for Rulemaking filed by Waters Broadcasting Corp. and Synergy Media, Inc. **BE GRANTED** as that petition relates to Hart, Coopersville and Pentwater, Michigan.

Respectfully submitted,

WATZ RADIO, INC.

By 
Dennis J. Kelly
(D. C. Bar #292631)
Its Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 41177
Washington, DC 20018
Telephone: 888-322-5291

April 8, 2003

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Opposition" was served by first-class United States mail, postage prepaid, on this 8th day of April, 2003 upon each of the following:

Matthew H. McCormick, Esquire
Reddy, Begley & McCormick, LLP
2175 K Street, NW, Suite 350
Washington, DC 20037-1845
Counsel for Waters Broadcasting Corp.

Robert L. Olender, Esquire
Koerner & Olender, P.C.
5809 Nicholson Lane, Suite 124
North Bethesda, MD 20852-5706
Counsel for Synergy Media, Inc.

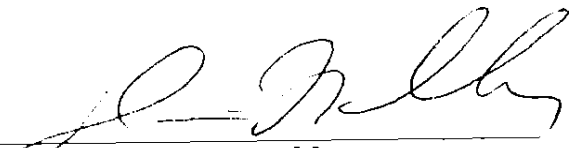
Mark N. Lipp, Esquire
Shook, Hardy & Bacon
600 14th Street, NW, Suite 800
Washington, DC 20005-2004
Counsel for Fort Bend Broadcasting Company

Todd D. Gray, Esquire
Dow, Lohnes & Albertson, P.L.L.C.
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036-6802
Counsel for Central Michigan University

Dawn M. Sciarrino, Esquire
Shaw Pittman
2300 N Street, NW
Washington, DC 20037-1128
Counsel for Steel Broadcasting, Inc.

Stephen C. Simpson, Esquire
1090 Vermont Avenue, NW
Suite 800
Washington, DC 20005
Counsel for George S. Flinn, Jr.

Harry C. Martin, Esquire
Fletcher Heald & Hildreth
1300 - 17th Street, North, Suite 1100
Rosslyn, VA 22209
Counsel for Northern Radio, Inc.


Dennis J. Kelly